



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION

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To: Chair Miadich, Commissioners Baker, Cardenas, Wilson, and Wood

From: Dave Bainbridge, General Counsel, Legal Division
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Subject: Pre-Checked “Contribution” Boxes Resulting in Involuntary Recurring Payments to Candidates and Committees

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In recent months, numerous news outlets have reported on the increasingly common practice of campaign committees using “pre-checked” boxes or preset settings on campaign donation webpages, such that the default setting for a purported “contribution” is a recurring donation, rather than a single donation. “Consumer advocates and campaign finance officials say the tactic misleads donors into giving more money than they intend because they must uncheck boxes to ensure their accounts are not regularly charged. Automatic deductions can be difficult to stop—let alone reverse—once they begin.”¹

Recently, after several news reports, an FEC recommendation that Congress prohibit the practice at the federal level, and subsequent federal legislation tackling the issue, California legislation has been introduced to address the issue at the state level. After researching the issue, it appears California would be one of the first states, if not *the* first state, to address the issue. Assembly Bill 775 (AB 775) would prohibit the practice of enrolling donors in recurring contributions through “pre-checked” boxes and would instead require the affirmative consent of the donors to make recurring donations.

AB 775 is largely sufficient in achieving its primary goal of prohibiting the practice, but could be improved by incorporating (1) an express provision requiring reimbursement upon request when recurring contributions are collected in violation of the statute and (2) clarifying whether a violation occurs once per initial sign-up or once per recurring payment collected in violation of the statute. Staff recommends the Commission support AB 775 and recommend the above modifications to the legislation.

BACKGROUND

The practice of pre-checked boxes signing donors up for recurring payments has been employed in a variety of manners by various campaign committees. In some cases, the language accompanying the pre-checked box has been characterized as confusing or even threatening. For example, one committee used a pre-checked recurring donation box with bold text reading, “We need to know we haven’t lost you to the Radical Left. If you UNCHECK this box, we will have to tell Trump you’re a DEFECTOR & sided with the Dems. CHECK this box and we can win

¹ Jeremy B. White, *California Recall Candidates Use Auto-Donation Tactic Trump Made Famous*, POLITICO, (May 17, 2021, 6:14 PM EDT), <https://www.politico.com/states/california/story/2021/05/17/california-recall-candidates-use-auto-donation-tactic-trump-made-famous-1382586>.

back the House and get Trump to run in 2024.” Below that warning, in regular text, read, “Make this a monthly recurring donation.” In responding to reporting on the pre-checked box and its accompanying language, a committee spokesperson told a news outlet the committee “employs the same standards that are accepted and utilized by Democrats and Republicans across the digital fundraising ecosystem.”²

In response to this emerging trend, at its May 6, 2021 meeting, the FEC unanimously approved a legislative recommendation that Congress amend the Federal Election Campaign Act (FECA) to require those soliciting recurring contributions to receive the affirmative consent of the contributors, to disclose additional information to their financial supporters, and to immediately cancel recurring contributions upon request. In explaining the recommendation, the FEC’s legislative memorandum noted, “[t]he Commission’s experience strongly suggests that many contributors are unaware of the ‘pre-checked’ boxes and are surprised by the already completed transactions appearing on account statements.”³

Since the FEC’s recommendation, one Senate bill (S.1786) and one House bill (H.R.3832) have been introduced to address the topic.

State Legislation

On June 17, California Assembly members Marc Berman and Lorena Gonzalez amended AB 775, replacing the previous contents of the bill and amending the Act to prohibit pre-checked campaign donation boxes and require the affirmative consent before enrolling donors in recurring contributions. The bill proposes adding Section 85701.5 to the Act. Similar to the language recommended by the FEC, the proposed statutory language reads:

- (a) A candidate or committee shall not solicit or accept a recurring contribution from a person unless the candidate or committee receives the affirmative consent of the person to make a recurring contribution at the time of the initial contribution. Passive action by the contributor, such as failing to uncheck a pre-checked box authorizing a recurring contribution, does not meet the requirement of affirmative consent under this section.
- (b) A candidate or committee that accepts a recurring contribution described in subdivision (a) shall do all of the following:
 - (1) Provide a receipt to the contributor that clearly and conspicuously discloses all terms of the recurring contribution within three days of receipt of the initial contribution or each recurring contribution.

² Eric Bradner, *GOP Group Tells Online Donors: Give Every Month or ‘We Will Have to Tell Trump You’re a DEFECTOR’*, CNN (Apr. 8, 2021, 1:42 PM EST), <https://www.cnn.com/2021/04/08/politics/nrcc-prechecked-boxes-trump-defector/index.html>.

³ FEC, *Legislative Recommendations of the Federal Elections Commission 2021* (May 6, 2019), <https://www.fec.gov/resources/cms-content/documents/legrec2021.pdf>, p. 12.

- (2) Provide all necessary information to cancel the recurring contribution in each communication with the contributor that concerns the contribution.
- (3) Immediately cancel a recurring contribution upon request of the contributor.

DISCUSSION

Assembly Bill 775 takes a significant step forward in addressing the trend of pre-checked recurring contribution boxes resulting in unintentional recurring “contributions”(to the extent that an unintended payment should be characterized as a contribution). While the Commission potentially has some avenues for partially addressing the issue within its existing regulations, AB 775 presents a much clearer path forward and would permit future regulations for the sake of interpreting, implementing, and making specific the statute(s) to be enacted.

In general, AB 775 sufficiently addresses the primary issue by requiring affirmative consent to authorize recurring contributions and further specifying that “[p]assive action by the contributor, such as failing to uncheck a pre-checked box authorizing a recurring contribution, does not meet the requirement of affirmative consent under this section.” The proposed language is straightforward and makes clear that pre-checked boxes would not be permissible under the new law. Further, the language largely mirrors the equivalent federal language recommended by the FEC.⁴

One significant provision is currently missing from the proposed legislation (as well as the FEC’s recommended language at the federal level), however. AB 775 prohibits a candidate or committee from soliciting or accepting a recurring contribution collected without the affirmative consent of the payor, such that to do so would result in a violation of the Political Reform Act and subject them to a consequential penalty. While this would presumably all but eliminate the practice of pre-checked recurring contributions, it is foreseeable that the practice may still occur in violation of the proposed statute. Under the proposed law, a candidate or committee would violate the Act by accepting a recurring contribution collected without the affirmative consent of the payor and would likely have to pay penalties as a result of that conduct, but the payor would have no express recourse in such a situation. Rather, the payor would seemingly rely on the candidate or committee to willingly return or reimburse the funds or, alternatively, through litigation such as small claims court. In anticipation of such occurrences and for the sake of protecting prospective victims of this practice, AB 775 should subject the candidate or committee to further violations and penalties if improperly collected contributions are not returned or reimbursed within a specific timeframe.

Additionally, AB 775 could be further clarified to more expressly address whether a violation of the proposed statute occurs on a single occasion—that is, at the time the initial payment is collected without the affirmative consent of the payor regarding recurring contributions—or each time a payment is accepted without the payor’s initial affirmative consent. Presumably, each payment would be considered acceptance of a contribution without

⁴ See FEC, *Legislative Recommendations, supra*, at pp. 12-13.

the payor's affirmative consent, such that a separate violation would occur with each payment. On the one hand, this would effectively eliminate any possibility that receipt of recurring contributions would be more valuable than the cost of a single penalty, but could also subject candidates or committees to extraordinarily high penalties in the event of, say, an error on the part of the vendor used for collecting contributions. In any case, the potential liability of the candidate or committee should be more expressly stated.

CONCLUSION

AB 775 takes a significant step forward in effectively addressing the emerging trend of candidates and campaigns using pre-checked recurring contribution boxes resulting in the collection of funds that were not intentionally given beyond the initial payment. Staff recommends the Commission support AB 775, but suggests that the bill should be amended to (1) provide express recourse for individuals whose funds are accepted in violation of the proposed statute, and (2) clarify the extent of liability violators of the statute are subject to.